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IN THE COURT OF APPEALS OF INDIANA

CHERI MILLER,[1]	)	
	)	
Appellant/Petitioner-Cross-Appellee,	)	
	)	
vs.	)	No. 33A01-0802-CV-46
	)	
THOMAS PAUL MILLER,	)	
	)	
Appellee/Respondent-Cross-Appellant.	)	

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Mary G. Willis, Judge
Cause No. 33C01-0601-DR-1

December 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

[1] The documents before us contain a discrepancy regarding the spelling of Appellant's name. We have chosen to use Cheri, based upon Appellant's signature on the preliminary agreement. Appellant's App. at 29.

Case Summary

Cheri Miller ("Wife") appeals the trial court's property settlement order entered as part of the dissolution of her marriage to Thomas Paul Miller ("Husband"). Husband cross-appeals. We affirm in part, reverse in part, and remand.

Issues

The parties raise the following issues, which we consolidate, reorder, and restate as follows:

I. Did the trial court commit reversible error by failing to put certain findings in proper form?

II. Did the trial court abuse its discretion in its treatment of certain marital assets/liabilities?

III. Did the trial court abuse its discretion in dividing the marital estate unequally?

IV. Did the trial court err in finding that Husband had dissipated $125,000 in assets?

V. Did the trial court err in its disposition of the parties' 2006 tax refunds?

Facts and Procedural History

Husband and Wife were married on April 15, 1995. On January 4, 2006, Wife filed a petition for legal separation, and on May 25, 2006, the trial court approved the parties' preliminary agreement. Husband filed a petition for dissolution of marriage on June 13, 2006.

At the time of the dissolution proceedings, Husband's business, Thomas P. Miller & Associates ("TPMA"), had a $250,000 line of credit with Old National Bank ("Old

National"). TPMA's line of credit was completely exhausted prior to the date of the dissolution petition, and the full amount of $250,000 was due and owing to Old National. Husband and Wife had a collateral account with Old National valued at approximately $325,000.

On November 10, 2006, Houlihan Valuation Advisors ("Houlihan") completed a business valuation of TPMA, and the report was later admitted at trial by stipulation of the parties. Houlihan valued TPMA at $30,000, taking into account TPMA's liabilities, which included the $250,000 owed to Old National on the line of credit.

On May 23, 2007, Wife filed a motion for findings of fact and conclusions thereon. The trial court held a contested hearing on May 23, 2007, and July 9, 2007. On August 31, 2007, the trial court entered its findings of facts and conclusions thereon, dissolving the marriage and dividing the marital property.

Wife filed a motion to correct error on September 24, 2007, and Husband filed a motion to correct error on October 1, 2007. The trial court held a hearing on both motions on November 14, 2007, and entered amended findings of fact and conclusions thereon on January 10, 2008. The trial court awarded 57% of the marital estate to Wife and 43% to Husband. Wife appealed, and Husband cross-appealed. Additional facts will be provided as necessary.

Discussion and Decision

I. Sufficiency of Findings

Wife requested findings of fact and conclusions thereon. Therefore, we apply a two-tiered standard of review. First, we "determine whether evidence supports the findings and then whether the findings support the judgment." *Carpenter v. Carpenter*, 891 N.E.2d 587, 592 (Ind. Ct. App. 2008). We will reverse only if the findings or judgment are clearly erroneous, meaning that a review of the record "leaves us firmly convinced that a mistake has been made." *Id*. (citation and quotation marks omitted).

On cross-appeal, Husband contends that the trial court erred by entering as findings of fact the mere recitation of a witness's testimony. Statements that a certain witness "testified that …" are not findings of fact. *Parks v. Delaware County Dep't of Child Servs.*, 862 N.E.2d 1275, 1279 (Ind. Ct. App. 2007). Rather, "a finding of fact must indicate, not what someone said is true, but what is determined to be true, for that is the trier of fact's duty." *Id*. (citation and quotation marks omitted). Thus, the "trier of fact must adopt the testimony of the witness before the 'finding' may be considered a finding of fact." *Id*. (citation and quotation marks omitted).

Here, the trial court entered extensive findings. Of the seventy-six findings, approximately twenty are mere recitations of witness testimony. However, "the inclusion of statements that are merely recitation of testimony is not harmful error and, instead, should be considered as mere surplusage." *Id*. (citing *Perez v. U.S. Steel Corp.*, 426 N.E.2d 29, 33 (Ind. 1981)). We also note that the order states, "The Court finds that any Finding of Fact which may be deemed a Conclusion of Law shall be deemed as such, and any Conclusion of Law which may be deemed a Finding of Fact shall be deemed as such." Appellant's App. at 24.

Our review of the trial court's conclusions indicates that they do not contain any of the same problematic language; moreover, they are sufficiently specific to operate as findings. As such, any error in the form of the findings is harmless.

II. Treatment of Certain Marital Property

Both Wife and Husband contend that the trial court abused its discretion in its treatment of certain property in the marital estate. Wife argues that the trial court double counted a $250,000 debt. Husband argues on cross-appeal that the trial court erred in including a $325,000 collateral account on his list of assets. "The division and valuation of marital assets is a matter within the sound discretion of the trial court." *England v. England*, 865 N.E.2d 644, 648 (Ind. Ct. App. 2007), *trans. denied*. "The party challenging the trial court's property division must overcome a strong presumption that the court complied with the statute and considered the evidence on each of the statutory factors." *Id*. On review, we neither reweigh evidence nor judge witness credibility, and we will consider only the evidence most favorable to the trial court's disposition of the marital property. *Id*. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Dillard v. Dillard*, 889 N.E.2d 28, 33 (Ind. Ct. App. 2008).

At the outset, we address Husband's argument that Wife has waived her right to appeal this issue due to her decision to withdraw part of her award from the proceeds of the sale of the marital residence. He cites Indiana Code Section 34-56-1-2, which states, "The party obtaining a judgment shall not take an appeal after receiving any money paid or collected on a judgment." Wife requested and received $50,000 from escrow funds on

October 12, 2007. Tr. at 516. Because Wife's withdrawal occurred after the date of judgment but before she filed her motion to correct error, Husband asserts that she is barred from seeking a modification of the property division order.

Our supreme court offered an in-depth explanation of Indiana Code Section 34-56-1-2 in *Indiana & Michigan Electric Co. v. Louck*, 243 Ind. 17, 181 N.E.2d 855 (1962):

> This statute is merely declaratory of the common-law rule, which holds that a party cannot accept the benefits of a decision and yet claim it is erroneous. The basis for such a principle is that the law does not permit such inconsistent positions to be taken. One cannot affirm and deny the same thing. Or, as some courts have said, the party is estopped to deny the validity of a proceeding which he has approved.
>
> It follows, however, that where no inconsistency in the position taken exists, the general rule is not applicable. An acceptance of an amount to which the acceptee is entitled in any event, does not estop him from appealing or claiming error in the judgment, since there is no inconsistency in such a position. 4 C.J.S. Appeal and Error § 216(1), p. 650 says:
>
> 'The rule that a party cannot maintain an appeal or writ of error to reverse a judgment or decree after he has accepted payment of the same in whole or in part has no application, as a rule, where appellant is shown to be so absolutely entitled to the sum collected or accepted that reversal of the judgment or decree will not affect his right to it, as in the case of the collection of an admitted or uncontroverted part of his demand, and in other similar cases, as where his appeal is to establish his claim to something additional or to a greater amount.'

Id. at 21-22, 181 N.E.2d at 856-57 (citations omitted).

We conclude that Wife's withdrawal of $50,000 from the escrow account is not inconsistent with her appeal. The trial court concluded that the total value of the marital estate was $1,170,794.31, of which Wife's 57% award was $671,034.92. Appellant's App. at 20-21. On appeal, she asserts that she should be awarded a greater sum based on the trial court's alleged error in double counting certain debt and disposing of a tax refund. Even if

we were to accept all of Husband's arguments raised on cross-appeal, Wife's withdrawal still would be well within the amount to which both parties agree that she is entitled. Therefore, Wife's receipt of $50,000 does not bar the present action.

We now address Wife's argument. She contends that the trial court erred in including, as part of the marital estate, debt already accounted for in the valuation of TPMA. In *Everette v. Everette*, 841 N.E.2d 210, 214 (Ind. Ct. App. 2006), we held that double counting a liability amounted to prima facie error. Here, Houlihan's valuation of TPMA indicates that the $250,000 debt on the Old National line of credit was included in its final calculation of $30,000. In finding number 73, the trial court included TPMA as a $30,000 asset and the Old National debt as a $250,000 liability. Appellant's App. at 19. Thus, it appears that the trial court engaged in double counting.

However, when we address Husband's argument regarding the Old National collateral account, we gain insight into the trial court's ultimate disposition of the Old National accounts. Husband asserts that the trial court erred in including the $325,000 collateral account on his list of assets. He further argues that this entry violates a stipulation entered into by the parties and, in essence, thwarts the trial court's intended 57/43 split. "When dividing marital property, the trial court must come close to the attempted apportionment otherwise the findings will not support the judgment and we must remand." *In re Marriage of Pulley*, 652 N.E.2d 528, 531 (Ind. Ct. App. 1995), *trans. denied*.

Specifically at issue is the effect of the parties' stipulation as to the $325,000 Old National collateral account, about which the trial court entered the following conclusion:

19. The Court now incorporates into the Order the stipulation tendered by the parties on May 23, 2007 and approved by the Court. It states, in part as follows:

> '1. The parties mutually agree that any and all proceeds which the Husband, Thomas P. Miller, receives from the estate or trust of his father, Frederick Miller or his mother, Thelma Miller's estate will be first used to release collateral from the Old National collateral account if the Old National Bank is willing to release the collateral. If the collateral cannot be released dollar for dollar in the amount Thomas Miller is tendering to the bank, Thomas Miller will pay said sums to Cheri Miller. Both of these acts are contingent upon the Court entering a judgment on behalf of Cheri Miller.'

Appellant's App. at 23.

Husband argues that the effect of the stipulation is that "if [his] inheritance is large enough to pay off the $250,000.00 line of credit debt [Wife] would receive that amount of assets from the collateral account." Appellee's Br. at 14. This would result in a shift from Husband to Wife of $250,000 from the collateral account. *Id*. He then argues that the shift would upset the trial court's intended 57/43 split, instead making it a 79/21 split in Wife's favor.

At first glance, Husband's argument appears meritorious. However, as discussed above, the trial court included the $250,000 debt both in its valuation of TPMA and in Husband's liability column. When taken together, the additional $250,000 in debt attributed to Husband offsets the additional $250,000 attributed to Husband on the asset side of the balance sheet. As such, we find no abuse of discretion in the trial court's ultimate disposition of the Old National accounts.

III. Division of Marital Estate

Next, Husband contends that the trial court abused its discretion in dividing the marital estate unequally. Indiana Code Section 31-15-7-5 outlines the factors to be considered when dividing marital property:

> The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:
>
> (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
> (2) The extent to which the property was acquired by each spouse:
> (A) before the marriage; or
> (B) through inheritance or gift.
> (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
> (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
> (5) The earnings or earning ability of the parties as related to:
> (A) a final division of property; and
> (B) a final determination of the property rights of the parties.

Here, the trial court awarded Wife 57% and Husband 43% of the marital estate. The court listed as statutory factors supporting its decision Wife's premarital assets, gifts, and inheritances as well as Husband's dissipation of assets. With regard to Wife's premarital assets, gifts, and inheritances, the trial court made the following findings:

> 15. Wife brought **approximately $400,000.00** in contributions to the marriage. This represents **approximately 81%** of the marital estate at the time of marriage.…
> 16. Husband testified he brought $60,000.00 to the marriage which represents **approximately 19%** of the marital estate at the time of marriage.

18. Wife produced cancelled checks which reflected a contribution of $96,817.34 or a contribution of 26% of the value of the marital residence **and improvements** from pre-marital assets. See Wife's Exhibit 3.
19. During the marriage, Wife and Husband received gifts from Wife's father on an annual basis until his death. Wife's father died in 1999 and Wife was the recipient of inheritance.
20. Wife inherited 1/2 interest in real estate located in Napoleon, Ohio which had a value of $45,000.00. At the time of the filing, her interest in the real estate was still held in her name alone. See Wife's Exhibit 6.
21. Between July 26, 1999 and August 4, 1999, Wife received $287,217.88 in cash proceeds from her father's estate, all of which was deposited in Husband's National City Bank account. See Wife's Exhibit 5.
22. Wife also inherited stock from her father which was sold during the marriage. See Wife's Exhibit 6.

Appellant's App. at 13 (emphases in original).

The record supports the trial court's findings that Wife brought significantly more to the marriage in terms of gifts, inheritances, and premarital assets than did Husband. Therefore, we conclude that the trial court acted within its discretion in concluding that such evidence was sufficient to rebut the statutory presumption favoring an equal division of the marital estate. We address the dissipation issue separately.

IV. Dissipation of Assets

Husband also claims that the trial court erred in finding that he had dissipated assets in the amount of $125,000. We review findings of dissipation for an abuse of discretion. *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 951 (Ind. Ct. App. 2006). We reverse only if the judgment is clearly against the logic and effect of the facts, circumstances, and reasonable inferences to be drawn from them. *Id*. Dissipation of marital assets occurs where a party engages in frivolous, unjustified spending of marital assets. *Id*. The test is "whether the

assets were actually wasted or misused." *Id*. (citation and quotation marks omitted). In determining whether dissipation of assets has occurred, we consider the timing of the transaction, whether the expenditure benefited the marriage or was made for a totally unrelated purpose, whether the amount was excessive or de minimis, and whether the dissipating party intended to hide, deplete, or divert the marital asset. *Id*. at 952. Transactions occurring during the breakdown of the marriage, just prior to filing, or during the pendency of a dissolution petition may require heightened scrutiny. *Bertholet v. Bertholet*, 725 N.E.2d 487, 499 (Ind. Ct. App. 2000). Likewise, the non-participating spouse's participation in or consent to the expenditure is a relevant consideration. *In re Marriage of Coyle*, 671 N.E.2d 938, 943 (Ind. Ct. App. 1996).

The record indicates that Husband transferred funds to TPMA from a Vanguard account substantially funded by Wife's inheritance money, gifts, and other premarital assets. The trial court concluded as follows:

> 10. The Court now concludes that the Husband dissipated/disposed of marital assets and withdrew $125,000.00 from the parties' joint Vanguard account without Wife's consent.
> 11. Pursuant to *Goodman v. Goodman*, (Ind. App. 1991 [sic]) 754 N.E.2d 595, the Court concludes that:
> 1) the expenditure did not benefit the marriage, but it was related to the marriage;
> 2) the timing of 8 months prior to the filing of the dissolution is relevant.
> 3) the expenditure of $125,000.00 is excessive rather than *de minimis*; and
> 4) there is evidence that Husband intended to hide or divert the funds from:
> a) Wife's lack of knowledge regarding the removal of the funds despite her involvement with the business;
> b) Husband's alleged signature of Wife; and

c) Husband incurred substantial risk in depositing the funds in light of the very quickly increasing debt.

Appellant's App. at 22.[2]

Husband argues that he used the transferred funds to keep TPMA in business and that "[s]pending $125,000 to save $250,000 in [collateral] assets cannot properly be considered a dissipation." Appellee's Br. at 11. He asserts that the expenditure was, at most, a "business judgment error." *Id*. at 12. However, the timing of the events suggests otherwise. According to Husband's Exhibit SS, the $125,000 transfer took place no later than June 17, 2005. Supp. App. at 97. The $250,000 loan to TPMA was not extended until August 5, 2005, and was not collateralized until September 2005, at least two months after Husband's infusion of the $125,000 into TPMA. Resp. Ex. F. Thus, the collateral, as yet unpledged, could not have been in jeopardy at that time. Additionally, a financial consultant that TPMA had hired testified by stipulation that he had advised Husband not to invest any more of his own money in the business as early as 2004.

Moreover, the record supports the finding that Wife did not consent to the transfer of the funds. She testified that she requested copies of the checks from Vanguard in an attempt to reconcile the account. Tr. at 48. She also testified that Husband signed her name to the two checks totaling $125,000, that she had never given him authority to do so, and that the funds "ended up in" TPMA. *Id.* at 48, 50-51. Finally, she testified that she did not even

[2] To the extent Husband challenges the sufficiency of the specific findings related to this issue, we reiterate that the trial court incorporated these conclusions as findings. *See* Appellant's App. at 24. Because these conclusions are specific and in proper form, the trial court cannot be said to have abused its discretion on this basis.

know that the checks had been written as of the date of filing for dissolution. *Id*. at 51. Husband merely invites us to reweigh evidence and judge witness credibility, which we may not do. The trial court acted within its discretion in concluding that Husband dissipated $125,000 in assets.

V. Tax Refunds

Finally, Wife asserts that the trial court erred in entering a finding regarding the application of proceeds from the parties' tax refunds. Husband filed a motion for a nunc pro tunc order on December 12, 2007, after the trial court had issued its original August 31, 2007 order and after the November 14, 2007 hearing on the motions to correct error. The trial court entered the following finding as part of its January 10, 2008 amended findings and conclusions:

> 76. Since the trial of this case, the parties by agreement filed joint 2006 tax returns and received $2,693.00 in refunds. In addition, Katz, Sapper & Miller have charged $2,650.00 for the preparation of the tax returns. [Husband's] counsel shall negotiate the tax refunds, pay the tax preparation amount and divide the balance between the parties.

Appellant's App. at 20.[3]

Wife contends that this finding is clearly erroneous because it is based merely on Husband's pleadings and not on any evidence presented to the trial court. Findings are clearly erroneous if the record contains no facts supporting them directly or indirectly.

[3] A nunc pro tunc entry is, in essence, a retroactive order that has the purpose of "supply[ing] an omission in the record of action really had, but omitted through inadvertence or mistake." *Johnson v. Johnson*, 882 N.E.2d 223, 227 (Ind. Ct. App. 2008) (citation omitted). Because no evidence was presented at the 2007 hearings regarding the 2006 tax refunds, the court was not supplying an omission of action *really had*, but omitted through inadvertence or mistake. Therefore, its conclusion on this issue cannot properly be deemed a nunc pro tunc entry.

Larkins v. Larkins, 685 N.E.2d 88, 90 (Ind. Ct. App. 1997). Wife argues that, had she been afforded the opportunity to present evidence regarding the application of the tax refunds, she would have demonstrated that the tax preparation fee was, in large part, attributable not to Husband and Wife's individual tax returns but to work performed for M&M Enterprises, LLC, a business solely owned by Husband.[4] Despite Husband's argument that the amount at issue is too minute to be trifled with, we conclude that Wife has a right to be heard on this issue. Because the record is devoid of evidence regarding the proper application of the tax refunds, we reverse and remand to the trial court to hear evidence on this issue. In all other respects, we affirm the trial court's judgment.

Affirmed in part, reversed in part, and remanded.

ROBB, J., and BROWN, J., concur.

[4] According to Wife, only $775 of the total $2,650 tax preparation fee was attributable to the preparation of the parties' personal returns.